IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martínez

Civil Action No. 15-cv-0166-WJM-NYW

TAMMY FISHER,

Plaintiff,

v.

BRIAN KOOPMAN, individually and in his official capacity as Detective in the Loveland, Colorado Police Department, and
LUKE HECKER, individually and in his official capacity as Chief of Loveland Police Department,

Defendants.

ORDER GRANTING SUMMARY JUDGMENT

In this lawsuit brought pursuant to 42 U.S.C. § 1983, Plaintiff alleges that Defendants violated her rights under the Fourteenth Amendment. Specifically, Plaintiff claims that Defendants, as members of the Loveland Police Department ("LPD"), improperly investigated her for allegedly disclosing the existence of a criminal investigation to the subjects of that investigation, and that Defendant Koopman obtained a warrant for her cellular phone records without probable cause and based on misrepresentations. Plaintiff claims those actions amounted to malicious prosecution in violation of her due process rights under the Fourteenth Amendment. She also pursues numerous tort claims arising under Colorado law.

Now before the Court are Defendants' Motion for Summary Judgment (ECF No. 46) and Defendants' Motion to Strike Plaintiff's Witness Designation #17 From Final Pre-Trial Order (ECF No. 64). For the reasons stated below, the Court grants

Defendants' Motion for Summary Judgment and therefore denies the Motion to Strike as moot.

I. LEGAL STANDARD

Summary judgment is warranted under Federal Rule of Civil Procedure 56 "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–50 (1986).

A fact is "material" if, under the relevant substantive law, it is essential to proper disposition of the claim. *Wright v. Abbott Labs., Inc.*, 259 F.3d 1226, 1231–32 (10th Cir. 2001). An issue is "genuine" if the evidence is such that it might lead a reasonable trier of fact to return a verdict for the nonmoving party. *Allen v. Muskogee*, 119 F.3d 837, 839 (10th Cir. 1997).

In analyzing a motion for summary judgment, a court must view the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998) (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). In addition, the Court must resolve factual ambiguities against the moving party, thus favoring the right to a trial. *See Houston v. Nat'l Gen. Ins. Co.*, 817 F.2d 83, 85 (10th Cir. 1987).

However, "conclusory and self-serving statements are insufficient to survive summary judgment." *Ford v. West*, 222 F.3d 767, 777 (10th Cir. 2000). Likewise, "general denials, or mere argument of an opposing party's case cannot be utilized to

avoid summary judgment," *Pasternak v. Lear Petroleum Expl., Inc.*, 790 F.2d 828, 834 (10th Cir. 1986), and "[v]ague, conclusory statements do not suffice to create a genuine issue of material fact." *Ford*, 222. F.3d at 777. Rather, "[t]o survive summary judgment, a nonmoving party must set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which he carries the burden of proof." *Christy v. Travelers Indem. Co. of Am.*, 810 F.3d 1220, 1233 (10th Cir. 2016) (internal quotation marks omitted). The Court is not obliged to "comb the record" to identify factual disputes or make a party's case for it. *Ford*, 222 F.3d at 777. Rather, "on a motion for summary judgment, it is the responding party's burden to ensure that the factual dispute is portrayed with particularity, without depending on the trial court to conduct its own search of the record." *Cross v. The Home Depot*, 390 F.3d 1283, 1290 (10th Cir. 2004) (internal quotation marks omitted).

II. BACKGROUND

A. Factual Record

The facts summarized below are drawn primarily from the Defendant's Statement of Material Facts (ECF No. 46 at 1–14), together with its supporting evidentiary materials, except as noted otherwise. Despite resolving factual ambiguities against the moving party, the Court must rely on Defendants' statement of facts because Plaintiff has failed to present a competent factual record of her own.

Initially, Plaintiff did not comply with the Court's Practice Standards, requiring that she admit or deny each enumerated fact asserted by Defendant. WJM Revised Practice Standards III.E.5. Thus while Plaintiff appears not to contest most of

Defendant's asserted facts, the Court cannot always tell whether there are particular statements with which Plaintiff disagrees.

Further, Plaintiff's statement of the facts includes assertions unsupported by any citation to evidence. (*See, e.g.*, ECF No. 52 at 1–5, ¶¶ 14–15, 17); *contra* WJM Revised Practice Standards III.E.6. ("Each . . . fact shall be accompanied by specific reference to admissible evidence in the record . . . .") *and Cross*, 390 F.3d at 1290. Plaintiff instead states "facts" based on her "personal knowledge" (ECF No. 52 at 1), and several of these "facts" are, indeed, merely recitals of what "Plaintiff believes" (*id.* at 4–5, ¶¶ 20–22). She cites her own testimony to support these statements, as well as to support several conclusory re-statements of her view of this case, including that "[Defendant] Koopman showed malice in his investigation," that "Koopman exhibited dishonesty," and that "Koopman's report . . . is untrue." (*Id.* at 2–3, ¶ 7; *see also id.* at 3, ¶ 13). These statements present no more than "self-serving allegations" and general argument of Plaintiff's case and are insufficient to defeat summary judgment. *Ford*, 222 F.3d at 777; *Pasternak*, 790 F.2d at 834. Few if any of Plaintiff's asserted facts do what is required: present specific evidence establishing a genuine dispute of material fact for trial. *Christy*, 810 F. 3d at 1233.[1]

[1] Further compounding Plaintiff's failure to raise material issues of fact, the record evidence she *does* cite frequently does not support her claims. For example Plaintiff string-cites Detective Koopman's deposition testimony for the proposition that Detective Arreola told her the Romanek investigation was "unfounded" in 2012. (ECF No. 52 at 2, ¶ 1.) This suggests to the reader that Detective Koopman acknowledges Plaintiff was told as much, but the cited testimony says no such thing. Instead, Detective Koopman states only that prior to 2012–13, neither he nor Detective Arreola was actively working on the case. (ECF No. 52-2 at 4.) Likewise, Plaintiff cites Detective Koopman's testimony for the proposition that his application for a search warrant "contained false, incomplete and misleading facts." (ECF No. 52 at 3, ¶ 13.) Far from containing any admission of false statements, the cited passage includes only Detective Koopman's unremarkable explanation that during the early phase of the

Overall, Plaintiff's filing gives the impression she is opposing only a Motion to Dismiss. At that stage of litigation, the Court would treat Plaintiff's allegations as true without looking for evidentiary support. At the summary judgment phase, however, Plaintiff must "go beyond the pleadings." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). She has not done so.

In any event, the Court's ruling does not turn on resolving any particular factual or evidentiary dispute. As explained below, Plaintiff's claims fail as a matter of law under any version of the facts put forward. To provide the factual background for this Order, however, the Court treats Defendant's stated facts as undisputed and deems them admitted except where set out otherwise. *Cf. Wagner-Harding v. Farmland Indus. Inc. Remp. Ret. Plan*, 26 F. App'x 811, 814–15 (10th Cir. 2001) (court has discretion to deem facts admitted in ruling on summary judgment where opposing party failed to comply with deadlines and procedural orders and movant "was highly inclusive and complete").

B. Factual Background

Plaintiff was employed by the Loveland Police Department ("LPD") from 1997 until 2012. (ECF No. 46 at 1, ¶ 1.) At times relevant to this lawsuit, Defendant Koopman was an LPD Detective and Defendant Hecker was LPD Police Chief.

In 2009, non-party Paul Arreola, another LPD detective, received information from a federal law enforcement agency that LPD should investigate Loveland residents

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investigation he was pursuing the "possibility" Plaintiff had committed a crime but did not have proof of a felony. (ECF No. 52-2 at 8.) Such misleading representations of the evidence are another reason the Court cannot rely on Plaintiff's alleged "facts."

Stanley and Lisa Romanek (the "Romaneks") for child pornography. (*Id.* at 2, ¶ 3.)

In July 2012, while an LPD officer, Plaintiff met the Romaneks when she responded to a complaint regarding a harassing phone call. (ECF No. 46 at 2, ¶ 5; ECF No. 46-1 at 172–73.) Shortly thereafter, Plaintiff learned of the child pornography allegations against the Romaneks from Detectives Arreola and Koopman. (ECF No. 46 at 2, ¶¶ 6–7; ECF No. 52 at 1–2, ¶ 1; ECF No. 46-1 at 27, 46.)[2] According to Plaintiff, her call to the Romanek home reminded Detective Arreola of the 2009 allegations, and he told her that he "was going to look into" those allegations. (ECF No. 46-1 at 46, 103.) Also in July 2012, Defendant Koopman asked Plaintiff to provide him with the IP address from an e-mail she had received from the Romaneks, to help him investigate the child pornography allegations. (ECF No. 46 at 2, ¶ 7; ECF No. 46-2 at 29; ECF No. 46-1 at 146.)

Plaintiff left the LPD in September 2012. (ECF No. No. 46 at 1, ¶ 1; ECF No. 2 ¶ 14.) In January or February 2013, Detective Koopman received additional information from a federal investigator that renewed the investigation into the Romaneks. (ECF No. 52-2 at 3.) Detective Koopman therefore began further follow-up on the investigation. (*Id.* at 3–4.)

Plaintiff met the Romaneks for breakfast in March 2013. (ECF No. 46 at 3, ¶ 10). She told them of the existence of the child pornography allegations against them. (ECF No. 46 at 3, ¶ 10; ECF No. 2 at 2, ¶ 3.) While the particulars are in some dispute,

[2] All ECF page citations are to the page number in the ECF header, which does not always match the document's internal pagination, particularly in materials with prefatory pages and in excerpts of deposition transcripts.

Plaintiff admits that she "told them that LPD had looked into a tip prior, the year before." (ECF No. 46-1 at 43.) According to Ms. Romanek, Plaintiff "volunteered" the information "that in 2008 there was a tip that [Mr. Romanek] was involved with child pornography, but that there was no proof and the case was closed." (ECF No. 46-3 at 6–7.)

After the breakfast, Plaintiff exchanged text messages with Ms. Romanek and on at least one occasion they discussed going for a walk. (ECF No. 46 at 3, ¶ 11; ECF No. 46-1 at 105; ECF No. 52 at 3, ¶ 8.) Plaintiff and her husband, LPD Sergeant Jeff Fisher,[3] then had dinner with the Romaneks, on approximately April 3, 2013. (ECF No. 46-1 at 145; ECF No. 46-5 at 9.)

A few days later, on April 12, 2013, Detective Koopman and other members of the LPD executed a search warrant at the Romanek home. (ECF No. 46 at 4, ¶ 15.) The warrant authorized LPD to search and/or seize materials related to the child pornography investigation, including electronic devices and communications, and any depictions of child pornography. (ECF No. 46 at 4, ¶ 14; ECF No. 46-7.) The search led to the seizure of several of the Romaneks' electronic devices. On review, it appeared to LPD that files had been recently deleted. (ECF No. 46 at 5–6, ¶ 25.)[4]

While LPD officers were searching her home, officers reported that Ms. Romanek made comments to them to the effect that she knew of the child pornography

[3] Mr. Fisher left the LPD in December 2014, after the events material to this lawsuit. (ECF No. 46-5 at 37.)

[4] LPD eventually concluded that the Romaneks' hard drive had been "wiped" using software called CCleaner. (ECF No. 46 at 6, ¶ 26.) In 2012, another member of the LPD had helped install this same software on the Fishers' home computer. (ECF No. 46 at 3–4, ¶ 8.) This furthered LPD's concern that Plaintiff had precipitated or been involved with the Romaneks' deletion of incriminating files.

allegations against her husband, mentioned she was friends with the Koopmans, and told them that she had recently had brunch with Plaintiff. (ECF No. 46 at 5, ¶¶ 21–22.)[5] LPD officers also corroborated that Plaintiff and Ms. Romanek had been in communication by reviewing Ms. Romanek's text messages. (ECF No. 46 at 6, ¶ 27.)

Detective Koopman then sought and obtained a search warrant for information from Plaintiff's cell phone provider, including her call and text activity. (ECF No. 46 at 7, ¶ 30; ECF No. 46-11.) In the warrant application, Detective Koopman stated his suspicion that Plaintiff had "obstructed [the] investigation [against the Romaneks] by revealing to the Romanek's [*sic*] that an investigating [*sic*] was pending against them." (ECF No. 46-12 at 5.) Detective Koopman stated that when LPD searched the Romaneks' home, Ms. Romanek had told him "that she was told by [Plaintiff] about three weeks ago . . . to expect a visit from the Police because [LPD] were investigating their home for child pornography." (*Id.* at 2.) He also noted the communications and meetings between Plaintiff and the Romaneks in the weeks preceding the search, and

[5] In her affidavit and deposition in this case, Ms. Romanek denies telling the police that Plaintiff had warned her of an impending search but acknowledged telling Detective Koopman that Plaintiff had informed the Romaneks of the 2008/2009 child pornography allegations. (ECF No. 52-3 at 3; ECF No. 52-8.) Plaintiff's complaint in this case alleged that "[d]uring the execution of the search warrant of the Romanek home, [Ms.] Romanek commented . . . that Tammy Fisher had warned her of the child pornography investigation and the impending search." (ECF No. 2 ¶ 17.) Defendants claim that "[d]uring a discussion" while the search was occurring, "there was a reference to the purpose of the search warrant being . . . child pornography, to which Ms. Romanek . . . stat[ed] 'that's what I thought' . . . 'or words to that effect,'" and she "was also observed . . . laughing and stating that she was friends with [Plaintiff] . . . and that she knew 'this was coming' or words to that effect." (ECF No. 46 at 5, ¶¶ 21–22.) As analyzed below, the dispute over exactly what Ms. Romanek said to LPD officers during the search is immaterial to resolution of Plaintiff's claims, given that Plaintiff acknowledges telling the Romaneks about the 2008/2009 allegations, that Ms. Romanek acknowledges telling the same to LPD officers, that Detective Koopman sought a search warrant following those statements, and that no charges against Plaintiff were ultimately filed.

that it appeared the Romaneks' hard drive had been "wiped" following communications between Plaintiff and Ms. Romanek. (*Id.* at 2; *see also* ECF No. 46 at 6–7, ¶¶ 29–30.) The Larimer County Court approved the warrant on May 8, 2013. (ECF No. 46 at 7, ¶ 31; ECF No. 46-12.)

The parties' filings do not establish whether the warrant for Plaintiff's phone records was ever executed or her phone ever searched. (*See* ECF No. 46 at 7–8; *id.* at 14–15 (warrant "issued"); ECF No. 52 at 4, ¶ 17 (assertion that "Plaintiff was subjected to legal process through the search warrant," with no evidentiary citation); ECF No. 2 ¶¶ 20, 36 (alleging Det. Koopman improperly sought the warrant, but not more).)

Detective Koopman then had a conversation with Plaintiff, which he recorded. (ECF No. 46 at 7, ¶¶ 34–35.) During this conversation, Plaintiff made comments confirming that she had told the Romaneks about the child pornography allegations against them.[6]

Detective Koopman submitted his investigation materials to the Larimer County District Attorney's Office. (ECF No. 46 at 8–9, ¶ 38.) The District Attorney's office concluded that it "believe[d] Tammy Fisher committed a crime under [Colo. Rev. Stat.]

[6] In the interview—and in her present filings—Plaintiff adamantly denies having told the Romaneks about an impending search or any ongoing investigation (ECF No. 46-13 at 2; ECF No. 52 at 4, ¶ 15), stating she then believed the investigation "was done and over" (ECF No. 46-13 at 2). But she acknowledged meeting the Romaneks for breakfast (*id.* at 3), and she made the following statements tending to corroborate to Detective Koopman that she had told the Romaneks about the child pornography allegations: "I remember [Detective Arreola] was working on it. Yeah. I knew Paul was working — and *I did mention that to them*. But that was like way in the past," and "I did mention — I said, [y]eah, I think, like last summer there — someone was looking for something." (*Id.* at 2 (emphasis added).)

§ 18-8-405," but also believed the applicable statute of limitations had run.[7] (ECF No. 46 at 9, ¶ 39; ECF No. 46-14 at 4.) No criminal charges were ever filed against Plaintiff.

C. Procedural History

Plaintiff initiated this lawsuit on January 9, 2015, in Larimer County District Court. (*See* ECF Nos. 1 & 2.) She brought two claims pursuant to 42 U.S.C. § 1983, alleging that her rights under the Fourteenth Amendment were violated. (ECF No. 2 ¶¶ 31–50.) As to both Defendants, she alleges they "pursued a malicious prosecution" against her (*id.* ¶ 35), and did so "without probable cause to believe she had committed any offense," (*id.* ¶ 37). She claims this violated "her right to freedom from malicious prosecution as guaranteed by the due process clause of the Fourteenth Amendment." (*Id.*) Plaintiff also brought a claim against Defendant Hecker for failure to train and supervise (*id.* ¶¶ 43–50), plus numerous tort claims under Colorado law.[8]

After Defendants removed to federal court (ECF No. 1), Plaintiff sought to amend her claims for malicious prosecution to also plead them as violations of the Fourth Amendment, and she sought to add the City of Loveland as a Defendant. (ECF No. 31-1.) In her reply in support of her motion for leave to amend, Plaintiff declared her

[7] Colorado Revised Statutes § 18-8-405 defines the Class 1 petty offense of second degree official misconduct where "[a] public servant . . . knowingly, arbitrarily, and capriciously: (a) Refrains from performing a duty imposed upon him by law; or (b) Violates any statute or lawfully adopted rule or regulation relating to his office."

[8] As against Defendant Koopman, Plaintiff's state law claims include: (1) malicious prosecution; (2) intentional infliction of emotional distress; (3) tortious interference with a business relationship; (4) abuse of process; (5) defamation *per se*. (ECF No. 2 ¶¶ 51–81.) As against Defendant Hecker her state law claims include: (1) negligent hiring; (2) negligent supervision; (3) negligent retention; (4) respondeat superior; and (5) vicarious liability. (*Id.* ¶¶ 82–115.)

"intent to add an additional claim for a violation of the Fourth Amendment right to be free from unreasonable searches." (ECF No. 36 at 1.) She then filed a "Supplement/Amendment," attaching a new proposed complaint with a separate claim for unreasonable search and seizure. (ECF No. 37.) The Court struck the "Supplement/Amendment" because Plaintiff never sought leave to file a sur-reply for her pending Motion to Amend. (ECF No. 38.)

United States Magistrate Judge Nina Y. Wang issued a recommendation to deny Plaintiff's Motion for leave to amend (ECF No. 40), which the undersigned adopted in its entirety. (ECF No. 45.) As to Plaintiff's request to add a Fourth Amendment basis for her malicious prosecution claim, the Court observed that to proceed on such claims, Plaintiff would need to show Defendants caused her to be confined or prosecuted and could not do so:

> The Tenth Circuit has 'repeatedly recognized' that 'the relevant constitutional underpinning for a claim of malicious prosecution under § 1983 must be 'the Fourth Amendment's right to be free from unreasonable seizures.'' *Becker v. Kroll*, 494 F.3d 904, 914 (10th Cir. 2007) (citation omitted). Thus, a claim for prosecution must be 'based on a seizure by the state—arrest or imprisonment.' *Id.* On the other hand, *Becker* does appear to suggest that a malicious prosecution claim can be founded on an unreasonable search or seizure of property as well. *See id.* at 916–17.
>
> Even so, the law is clear that Defendants must have actually "caused [Plaintiff's] continued *confinement or prosecution*." *Novitsky v. City of Aurora*, 491 F.3d 1244, 1258 (10th Cir. 2007) (emphasis added). Plaintiff concedes that she was never seized within the meaning of the Fourth Amendment. (ECF No. 41 at 2.) Plaintiff further concedes that at no point was she actually prosecuted, as no criminal charges were ever filed against her. (ECF No. 36 at 4.) Plaintiff therefore cannot establish a *prima facie* Fourth Amendment malicious prosecution claim. *See* Restatement (Second) of Torts

§ 661.

(ECF No. 45 at 4–5.) The Court therefore denied leave to amend, concluding this amendment would be futile. (*Id.;* ECF No. 40 at 5.)

Plaintiff never filed a subsequent motion for leave to amend. Thus the only claims pending are those pled in her original complaint under the Fourteenth Amendment, and for state law torts. Defendants have moved for summary judgment as to all claims. (ECF No. 46.)

III. ANALYSIS

A. Fourteenth Amendment Claims Under § 1983 (Count One)

Plaintiff's claims for malicious prosecution in violation of the Fourteenth Amendment (ECF No. 2 ¶¶ 31–50) fail as a matter of law. Plaintiff herself "acknowledges that the relevant constitutional underpinning for a claim for malicious prosecution must be the Fourth Amendmen[t]" (ECF No. 52 at 6), rather than the Fourteenth Amendment.

Plaintiff's concession on this point is both inescapable and fatal to her pending federal claims. Following *Albright v. Oliver*, 510 U.S. 266 (1994), the Tenth Circuit has definitively stated that claims for malicious prosecution are not cognizable under the Fourteenth Amendment as either substantive or procedural due process claims:

> [T]he unavoidable construction of *Albright* is that no § 1983 claim will arise from filing criminal charges without probable cause under the substantive due process protections of the Fourteenth Amendment. And although the plaintiff in *Albright* did not raise a *procedural* due process claim, we find *Albright*'s reasoning regarding substantive due process equally persuasive with regard to the Fourteenth Amendment's procedural component. In the initial stages of

> a criminal proceeding, the Fourth Amendment protects a person's liberty interests under the constitution by ensuring that any arrest or physical incarceration attendant to a criminal prosecution is reasonable. The more general due process considerations of the Fourteenth Amendment are not a fallback to protect interests more specifically addressed by the Fourth Amendment in this context.

Becker, 494 F.3d at 919 (internal citations and quotation marks omitted); *see also Albright*, 510 U.S. at 273–74.

So, although Plaintiff's pending § 1983 claims allege malicious prosecution in violation of the Fourteenth Amendment *only*, she correctly acknowledges that she cannot proceed on this ground. These claims thus fail as a matter of law. *See Albright*, 510 U.S. at 273–74; *Becker*, 494 F.3d at 918–25.

B. Fourth Amendment Analysis

Plaintiff has no pending Fourth Amendment claims. Her previous requests to add such claims to her complaint were denied and stricken (ECF Nos. 38, 40, 45), and she has not filed any subsequent request to add such claims.

Despite this, Plaintiff now argues in her response to Defendant's Motion for Summary Judgment, that "she should be allowed to amend her complaint either to clarify her basis or allege a Fourth Amendment violation." (ECF No. 52 at 7.) In the alternative, she seems to suggest the Court should treat her pending claims as already encompassing a Fourth Amendment claim, suggesting her previous attempt to add such claims was only to "clarify" her initial complaint. (*Id.* at 6.)

Plaintiff's arguments are unavailing. Initially, it is clear that Plaintiff does not already have Fourth Amendment claims pending, either for malicious prosecution or

any other Fourth Amendment violation. Her § 1983 claims explicitly referenced the Fourteenth Amendment and only the Fourteenth Amendment. (ECF No. 2 ¶¶ 31–42.) Her pleadings thus did not put Defendants on notice of any other basis for her claims. To the contrary, Plaintiff herself sought to *add*, first, a Fourth Amendment ground for her pending malicious prosecution claims (ECF No. 31), and, then, a separate Fourth Amendment claim (ECF No. 37-1 at 10–13). These filings acknowledge that Plaintiff's complaint did not already include such claims. And, even after the Court entered an Order stating that "It seems . . . this claim could be pled as a violation of the Fourth Amendment" (ECF No. 45 at 5 n.2), Plaintiff did not take the hint to try again to plead a Fourth Amendment claim. Thus discovery proceeded and the case advanced *only* as to her Fourteenth Amendment claims.

Plaintiff's attempt to add such claims now, argued in her opposition to summary judgment (ECF No. 52 at 7), is untimely, procedurally improper, unauthorized absent Court order granting leave, and fails to put Defendants on fair notice of any additional claims against them. *See* Fed. R. Civ. P. 15(a)(2); D.C.Colo.LCivR 7.1(d); WJM Revised Practice Standards III.B; *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554–55 (2007) (pleadings must "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests" (ellipses in original; internal quotation marks omitted)). The Court therefore rejects Plaintiff's thirteenth-hour attempt to add a new Fourth Amendment claims as a means of escaping summary judgment.

Further, even if Plaintiff had been (or were now) allowed to proceed on a Fourth Amendment basis for malicious prosecution, nothing has altered the Court's previous conclusion that adding such claims would be futile. As the Court previously observed,

"a claim for malicious prosecution must be 'based on a seizure by the state—arrest or imprisonment.'" (ECF No. 45 at 4 (quoting *Becker*, 494 F.3d at 914).) Such claims *might* also be acceptably "founded on an unreasonable search or seizure of property," but "Defendants must have actually 'caused [Plaintiff's continued *confinement or prosecution*." (*Id.* (emphasis in original) (quoting *Novitsky v. City of Aurora*, 491 F.3d 1244, 1258 (10th Cir. 2007).)

Here, the summary judgment record confirms that Plaintiff was never arrested and never charged with a crime. She was therefore never seized within the meaning of the Fourth Amendment and cannot establish a *prima facie* claim for malicious prosecution. (ECF No. 45 at 5 (citing Restatement (Second) of Torts § 661).) This conclusion is inescapable following *Becker*. There, the plaintiff faced criminal charges that were later dismissed. 494 F.3d at 911, 914. The Tenth Circuit concluded this was an insufficient basis for a Fourth Amendment malicious prosecution claim, concluding that "[a] groundless charging decision may abuse the criminal process, but it does not, in and of itself, violate the Fourth Amendment absent a significant restriction on liberty." *Id.* at 915; *see also id.* (declining to "expand Fourth Amendment liability in cases where the plaintiff has not been arrested or incarcerated"). Plaintiff cannot sustain a malicious prosecution claim where no criminal charges were filed against her.

Finally, although no claim for unreasonable search or seizure of Plaintiff's property is pending, the Court notes that on the present record, Plaintiff has not put forward allegations or evidence to support such a claim. Plaintiff's complaint nowhere alleges that the search warrant for her phone records was executed or a search was

actually carried out. (*See* ECF No. 2 ¶¶ 20, 36.) The summary judgment filings also do not point to evidence documenting whether or how such a search took place. (*See* ECF No. 46 at 7, ¶¶ 30–34; ECF No. 52 at 3–4, ¶¶ 13–15; *id.* at 11 (claiming there was an "illegal search of her phone records," but with no evidentiary citations).)[9] The Court therefore has no evidence presented by Plaintiff showing that she could establish a Fourth Amendment claim. This is another reason the Court will not consider Plaintiff's belated attempt to plead a claim for unreasonable search or seizure.

C. Official Capacity Claims

Plaintiff has filed suit against Defendants Koopman and Hecker in both their individual and official capacities. (*See* ECF No. 2.) "A suit against a municipality and a suit against a municipal official acting in his or her official capacity are the same." *Watson v. City of Kansas City, Kan.*, 857 F.2d 690, 695 (10th Cir. 1988); *see also Kentucky v. Graham*, 473 U.S. 159, 166 (1985) ("As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity . . . the real party in interest is the entity."). Further, "a municipality cannot be held liable where there was no underlying constitutional violation by any of its officers." *Graves v. Thomas*, 450 F.3d 1215, 1218 (10th Cir. 2006). Because Plaintiff cannot establish unconstitutional

[9] Some references in the exhibits attached to the parties' summary judgment filings suggest that Detective Koopman did at some point acquire the records relating to Plaintiff's phone, including "results of Tammy Fisher's phone search," and that those records were included in the file presented to the District Attorney's office. (*See* ECF No. 46-2 at 20, 25.) Perhaps this indicates that the search or seizure of Plaintiff's phone records did take place. But the parties do not address this point and the Court will not "comb the record" to make Plaintiff's case for her. *Ford*, 222 F.3d at 777; *Cross*, 390 F.3d at 1290.

conduct by Defendants Hecker and Koopman in their individual capacities, she also cannot prevail on a claim against them in their official capacities.

D. Plaintiff's Failure to Train and Supervise Claim Against Defendant Hecker (Claim Two)

Plaintiff's Second Claim is against Defendant Hecker, for failure to train and supervise. (ECF No. 2 ¶¶ 43–50). "Failure to supervise and failure to train are treated the same in the Tenth Circuit." *A.B. ex rel. B.S. v. Adams-Arapahoe 28J Sch. Dist.*, 831 F. Supp. 2d 1226, 1245 (D. Colo. 2011). Failure to train is most commonly asserted as a species of *Monell* (municipal) liability, but can also lead to individual liability for supervisors in some circumstances. *See Greason v. Kemp*, 891 F.2d 829, 837 (11th Cir. 1990); *see also Dodds v. Richardson*, 614 F.3d 1185, 1211 (10th Cir. 2010) (Tymkovich, J., concurring) ("supervisors may have a responsibility, as do municipalities, to ensure that their subordinates are properly trained—failure to carry out this duty may in some cases result in a violation").

In the Tenth Circuit, courts apply a three-part test to determine a supervisor's liability for failure to train or supervise. *See Sutton v. Utah State Sch. for Deaf & Blind*, 173 F.3d 1226, 1240 (10th Cir. 1999). As relevant here, one required element is causation—a showing that the supervisor's conduct was "causally related to the constitutional infringement by his subordinate." *Id.*; *Greason*, 891 F.2d at 837. Thus, as the Court previously observed in this case, "Plaintiff cannot prevail on her claim for failure to train and supervise without first establishing an underlying constitutional violation." (ECF No. 45 at 5 (citing *Ware v. Unified Sch. Dist. No. 492*, 902 F.2d 815, 819 (10th Cir. 1990), and *Perry v. Taser Int'l Corp.*, 2008 WL 961559, at *3 (D. Colo.

Apr. 8, 2008)).) Plaintiff cannot succeed on her failure to train/supervise claim against Defendant Hecker where there is no underlying unconstitutional conduct to which his supervisory actions could be causally linked. *Cf. Hinton v. City of Elwood, Kan.*, 997 F.2d 774, 782 (10th Cir. 1993) ("where a municipality is 'sued only because [it was] thought legally responsible' for the actions of its officers, it is 'inconceivable' to hold the municipality liable if its officers inflict no constitutional harm, regardless of whether the municipality's policies might have 'authorized' such harm" (quoting *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986))).

E. State Law Tort Claims

1. CGIA

The Colorado Governmental Immunity Act ("CGIA") codifies governmental immunity from suit in tort cases brought against Colorado public entities and public employees. Colo. Rev. Stat. §§ 24-10-101 *et seq*. In relevant part, the CGIA makes public employees immune from tort liability for acts occurring during the performance of their duties and within the scope of their employment, "unless the act or omission causing [] injury was willful and wanton." *Id*. § 24-10-118(2)(a); *see also, e.g. Carothers v. Archuleta Cnty. Sheriff*, 159 P.3d 647, 650 (Colo. App. 2006).

"The phrase 'willful and wanton' is not defined in the CGIA. However, the majority of Colorado courts to address this issue have applied the following definition from Colorado's exemplary damages statute: Willful and wanton conduct is 'conduct purposefully committed which the actor must have realized as dangerous, done heedlessly and recklessly, without regard to the consequences, or the rights and safety

of others, particularly the plaintiff[s].' Colo. Rev. Stat. § 13–21–102(1)(b)." *A.B. ex rel. B.S.*, 831 F. Supp. at 1258 (citing *Zerr v. Johnson*, 894 F. Supp. 372, 376 (D. Colo. 1995) and *Moody v. Ungerer*, 885 P.2d 200, 205 (Colo. 1994)).

The CGIA also requires that "[i]n any action in which allegations are made that an act or omission of a public employee was willful and wanton, the specific factual basis of such allegations shall be stated in the complaint." Colo. Rev. Stat. § 24–10–110(5)(a). "Failure to plead the factual basis of an allegation that an act or omission of a public employee was willful and wanton shall result in dismissal of the claim for failure to state a claim upon which relief can be granted." Colo. Rev. Stat. § 24-10-10(b). The Act "does not define 'specific factual basis,' but the phrase's plain meaning is unambiguous. It requires that a plaintiff set forth in his complaint specific facts which support his claim that public employees acted willfully and wantonly. Conclusory allegations therefore do not satisfy section 24-10-110(5)." *Robinson v. City & Cnty. of Denver*, 39 F. Supp. 2d 1257, 1264 (D. Colo. 1999).

In the Court's review, all of Plaintiff's tort claims fail to meet these requirements of the CGIA and are subject to dismissal on that basis. Plaintiff's briefing opposing summary judgment on this issue does little more than to expand her own repetitive and conclusory rhetoric about Defendants' alleged misconduct. Her personal thesaurus of wrongdoing states that Defendants' behavior was "egregious," "amount[s] to criminal behavior," and was "unfitting for public servants," "devious," "outrageous, atrocious, and intolerable," "utterly intolerable in a civilized society," and "tears the fabric of an orderly society." (*See generally* ECF No. 52 at 15–18.) But while Plaintiff has many words for

her own view of Defendants' conduct, she has no evidence. In eight pages of briefing opposing summary judgment as to eight separate tort claims (*i.e.*, a posture in which Plaintiff has the burden to direct the Court to specific evidence demonstrating a genuine issue of material fact for trial), Plaintiff fails to cite a single piece of record evidence to support any of her claims. (*See* ECF No. 52 at 15–23.)

Plaintiff cannot survive summary judgment on this basis and the Court concludes that summary judgment against all of her state law claims is warranted under the CGIA because Plaintiff has failed to substantiate a showing of willful and wanton conduct or of a "specific factual basis" for such allegations. Nevertheless, because it is often simpler to resolve Plaintiff's individual claims on other grounds, the Court addresses each remaining claim in turn.

2. Malicious Prosecution by Defendant Koopman (Third Claim)

Plaintiff has pled the tort of malicious prosecution by Defendant Koopman. (ECF No. 2 ¶¶ 51–56.) To prevail on a claim for malicious prosecution, Plaintiff must establish several elements, including that "defendant contributed to bringing a prior action against the plaintiff." *Hewitt v. Rice*, 154 P.3d 408, 411 (Colo. 2007). Here, as Plaintiff acknowledges, no prior action was brought against her. Plaintiff suggests that "criminal proceedings" in the "investigatory phase" amounting to "legal process" are sufficient to sustain her claim. (ECF No. 52 at 16–17.) She cites no legal authority in support. Her claim for malicious prosecution fails as a matter of law because no prosecution or "prior action" was ever instituted.

3. Intentional Infliction of Emotional Distress

Plaintiff alleges that Defendant Koopman committed the tort of intentional

infliction of emotional distress by "initiat[ing] a baseless criminal charge" against her, leading to her "mental pain and anguish, emotional trauma, embarrassment, and humiliation." (ECF No. 2 ¶¶ 59, 63.) "To prevail on a claim for intentional inflection of emotional distress, she must show that (1) the defendant engaged in extreme and outrageous conduct; (2) recklessly or with the intent of causing the plaintiff severe emotional distress; (3) causing the plaintiff severe emotional distress." *Matthys v. Narconon Fresh Start*, 104 F. Supp. 3d 1191, 1205 (D. Colo. 2015) (citing *Pearson v. Kancilia*, 70 P.3d 594, 597 (Colo. App. 2003)).

Plaintiff's briefing identifies no record evidence to support any element of this claim. (ECF No. 52 at 17–18.) In particular, Plaintiff cites no evidence suggesting that Defendant Koopman acted with the *intent* to cause Plaintiff emotional distress. Absent any cited evidence supporting a necessary element, Plaintiff raises no triable issue of fact and summary judgment is appropriate.

4. Tortious Interference With a Business Relationship (Fifth Claim)

Plaintiff's next claim is that Defendant Koopman tortiously interfered with her employment as a Larimer County Bond Commissioner. (ECF No. ¶¶ 64–71.) This tort requires showing that a defendant "intentionally and improperly interfere[d] with the performance of a contract between [plaintiff] and a third person by inducing or otherwise causing the third person not to perform the contract." *Omedelena v. Denver Options, Inc.*, 60 P.3d 717, 721 (Colo. App. 2002).

Again, Plaintiff cites no record evidence that could prove up any element of her claim. (ECF No. 52 at 18.) To the contrary, the evidence before the Court shows that

Plaintiff's employment as a Bond Commissioner has continued. (ECF No. 46 at 2, ¶ 2; ECF No. 52 at 18.) Plaintiff's brief asserts that she was temporarily suspended from her employment and had "negative information placed in her personnel file." (ECF No. 52 at 18.) She provides no evidence. She also does not explain how either action—even if proved—would amount to contractual non-performance by her employer. There is thus no showing that the "third party" (Plaintiff's employer) was induced not to perform and this claim also fails as a matter of law.

5. Abuse of Process (Sixth Claim)

Plaintiff's Sixth Claim is that Defendant Koopman committed abuse of process. (ECF No. 2 ¶¶ 72–75.) Plaintiff must prove "(1) an ulterior purpose for the use of a judicial proceeding; (2) willful action in the use of that process which is not proper in the regular course of the proceedings, that is, use of a legal proceeding in an improper manner; and (3) resulting damage." *Walker v. Van Laningham*, 148 P.3d 391, 394 (Colo. App. 2006).

This claim fails for at least two reasons. First, for essentially the same reason Plaintiff's malicious prosecution claim fails: no "judicial proceeding" was initiated. Plaintiff argues that Defendant used "the legal process" by obtaining a search warrant on allegedly false information but she continues to cite no specific evidence for her pervasive assertion that Defendant Koopman "knew the information in the warrant was false." (ECF No. 52 at 19.) She likewise cites no legal authority for the proposition that obtaining a search warrant, without more, is a sufficient "judicial proceeding" to support an abuse of process claim. (*See id.*)

Rather, Plaintiff relies on *Walker*, where the court explained:

> The essence of the tort of abuse of process is the use of a legal proceeding primarily *to accomplish a purpose that the proceeding was not designed to achieve.* Establishment of a *prima facie* case requires not only proof of an ulterior motive but proof of willful actions by the defendant in the use of process which are not proper in the regular conduct of a proceeding. The legal proceeding must be used in an improper manner, for example, to accomplish a coercive goal.

148 P.3d 391 at 394 (emphasis added). In *Walker* the plaintiff was prosecuted for violating an animal ordinance after the defendants complained about his dog. *Id.* at 393. The Court dismissed his abuse of process claim because the defendants had not instituted process in any improper way, but only in keeping with the proper purpose and function of the ordinance. *Id.* at 395.

This highlights the second reason Plaintiff's claim fails. She has not substantiated any improper purpose underlying Defendant Koopman's actions in seeking a search warrant. Even assuming for argument's sake that he did lack probable cause and made misrepresentations, as Plaintiff alleges, she still presents no evidence raising a genuine dispute that he sought a warrant for any improper purpose, *i.e.*, for any reason other than to collect evidence as part of his investigation of the Romaneks. She vaguely insinuates that he acted for "illicit purposes" or to "to advance his personal interests within the Loveland Police Department" (ECF No. 52 at 19; *see also* ECF No. 2 ¶ 73), but once again she has no evidence. Plaintiff's mere speculation of an improper motive presents no triable issue of fact. *See Self v. Crum*, 439 F.3d 1227, 1236 (10th Cir. 2006) ("Inferences supported by conjecture or speculation will not

defeat a motion for summary judgment.").

6. Defamation *Per Se* (Seventh Claim)

Plaintiff's Seventh Claim is for defamation *per se*. Imputation of a criminal offense is recognized as one of the traditional categories of defamation *per se*, *i.e.*, a statement which is "on its face . . . unmistakably recognized as injurious (defamatory meaning)." *Gordon v. Boyles*, 99 P.3d 75, 79–80 (Colo. App. 2004). However, "[t]ruth is a complete defense to defamation." *Id. at* 81. And "absolute truth is not required; instead, a defendant need only show substantial truth, that is, 'the substance, the gist, the sting of the matter is true.'" *Id.*

Plaintiff once again fails to point to any evidence supporting her claim. She does not identify what defamatory statements she claims Detective Koopman made, their content, when they were made, or to whom. (*See* ECF No. 52 at 20.) She vaguely references his "[police] report[s], affidavits or oral communication," but fails to identify any specific statement(s) she claims was/were defamatory which she can prove was/were untrue. Her allegations lack the particularity and support needed to survive summary judgment. See *Cross*, 390 F.3d at 1290; *Christy*, 810 F.3d at 1222.

Moreover, the essence of Plaintiff's allegation is that Koopman "claimed that Plaintiff committed one or more crimes," and that those allegations proved untrue. (ECF No. 52 at 20.) Defendant Koopman's reports and/or his warrant application stated his *suspicion* that Plaintiff might have committed criminal activity. To the extent they set out factual statements, those statements were substantially true: Plaintiff *did* have communications with the Romaneks and she *did* inform them of the prior

allegations regarding child pornography. The fact Plaintiff believed the investigation was closed or unfounded at the time does not negate the substantial truth of Koopman's statements when he made them. Nor do disputes about exactly what Ms. Romanek told to police. The District Attorney's conclusion that if not for the statute of limitations it would have filed charges confirms the substantial truth of Defendant Koopman's statement that he *suspected* some misconduct by Plaintiff. The "gist" of his suspicions was substantially true, and this defeats Plaintiff's defamation claim. *See Gordon*, 99 P.3d at 80. Thus, in addition to being subject to dismissal under the CGIA, Plaintiff's defamation claim cannot survive summary judgment on its merits.

7. Claims Against Hecker: Negligent Hiring, Supervision, and Retention, Respondeat Superior and Vicarious Liability (Eighth Through Twelfth Claims)

Plaintiff's tort claims against Defendant Hecker all fail as a matter of law, primarily pursuant to the CGIA. Initially, as to Plaintiff's Eighth Claim, for negligent hiring, Plaintiff admits that Defendant Hecker "was not responsible for hiring Koopman," and her claim fails on that basis. (ECF No. 52 at 21; *see also* ECF No. 46-1 at 140.)

Additionally, as to Plaintiff's Eighth, Ninth, Eleventh, and Twelfth claims, she neither alleges nor substantiates any claim of "wilful and wanton" conduct by Defendant Hecker. (*See* ECF No. 2 ¶¶ 82–92, 100–15.) He therefore enjoys immunity from these claims under the CGIA. Colo. Rev. Stat. § 24-10-118(2)(a). Plaintiff's Tenth Claim (for negligent retention) recites the words "willful and wanton behavior" (ECF No. 2 ¶ 98), but otherwise recites only conclusory allegations of breached duties and utterly fails to plead a "specific factual basis" for her allegations. Colo. Rev. Stat. § 24-10-110(5)(a)–(b).

Moreover, as to all of these claims, the essence of Plaintiff's allegation is that Defendant Hecker was negligent and/or derivatively liable for the conduct of Defendant Koopman.[10] Plaintiff has not put forward *any* evidentiary record to show Defendant Hecker engaged in "wilful and wanton" conduct injurious to Plaintiff. She points to no evidence of any specific acts or omissions by Defendant Hecker that injured her. And she cites no legal authority supporting her implied theory that negligent supervisory acts or responsibility for the acts of a subordinate could also constitute "wanton and willful" misconduct by the supervisor. To the contrary, Plaintiff's own discussion of the standard for liability under the CGIA acknowledges that "[i]n order to constitute 'willful and wanton' misconduct, *[an] act or omission must be not only negligent* but exhibit conscious disregard for [the] safety of others." (ECF No. 52 at 22–23 (quoting Black's Law Dictionary 1434–35 (5th ed. 1979) (emphasis added).) Because Plaintiff has not established any triable issue of fact on the claim that Defendant Hecker engaged in any "wilful and wanton" acts, but effectively alleges only negligent misconduct, the Court concludes he has immunity from these claims under the CGIA. Colo. Rev. Stat. § 24-10-118(2)(a).

IV. CONCLUSION

For the reasons set forth above, the Court ORDERS as follows:

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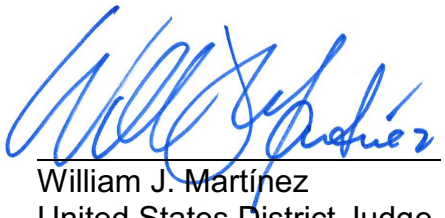
[10] *See* ECF No. 2 at 19–20 (negligent supervision, alleging breach of a "duty of reasonable care"); *id.* at 20 (negligent supervision, alleging breach of a "supervisory duty" "to ensure the safety of Plaintiff against the conduct of Koopman"); *id.* at 21 (negligent retention, alleging breach of a "duty to retain only competent, qualified and trained employees"); *id*. at 21–22 (respondeat superior, alleging "responsib[ility] for the actions and omissions of Defendant Koopman); *id.* at 22–23 (vicarious liability, alleging "responsib[ility] for the actions and omissions of Defendant Koopman"); *see also* ECF No. 52 at 21 (arguing Hecker created "an undue risk of harm" and "had a special duty of care").

1. Defendants' Motion for Summary Judgment (ECF No. 46) is GRANTED as to all claims;
2. Defendants' Motion to Strike Plaintiff's Witness Designation #17 From Final Pre-Trial Order (ECF No. 64) is DENIED AS MOOT;
3. The Jury Trial set to commence on September 19, 2016 as well as the Final Trial Preparation Conference set for September 2, 2016, are hereby VACATED; and
4. Judgment shall enter in favor of Defendants, and Defendants shall have their costs. The Clerk shall terminate this action.

Dated this 1st day of August, 2016.



William J. Martínez
United States District Judge